

CAUSE NO 18-DCR-0152

| | | |
|------------------------------|---|---|
| STATE OF TEXAS | § | IN THE DISTRICT COURT |
| | § | |
| vs. | § | 344TH JUDICIAL DISTRICT COURT |
| | § | |
| ZENA COLLINS STEPHENS | § | CHAMBERS COUNTY, TEXAS |

DEFENDANT ZENA STEPHENS' PRETRIAL WRIT OF HABEAS CORPUS

COMES NOW, Zena Stephens and files this her Pretrial Writ seeking dismissal of the indictment in this cause and would show the Court as follows:

I. SUMMARY

This Writ outlines the lack of the Texas Attorney General's authority to prosecute this indictment due to the lack of the authority of the Texas Attorney General to appear before the grand jury and bring the criminal allegations set forth in in Count I. of the indictment namely, the Tampering with a Governmental Record Allegation. The Writ also addresses and challenges the Constitutionality of the Texas Election Code provisions applied here that permit a prosecutor as opposed to a judge to choose venue after receipt and evaluation of a criminal allegation. Finally, the Writ challenges vagueness of the Texas Election Code criminal provisions and the failure of the indictment to include language reflecting that

The Texas Attorney General does not have the Constitutional or statutory authority to prosecute Count I of the indictment; and even if it did, such a prosecution must be initiated in Jefferson County. The Texas Election Code provisions permitting the selection of venue by the prosecutor violate the 6th and 14th Amendments of the United States Constitution, as well as the separation of powers clause of the Texas Constitution. This is so because ap applied here the Election Code

allows for venue to be determined after a consideration of the substantive allegations constituting the alleged offense and the person against whom the proposed prosecution is initiated, as opposed to being predetermined as contemplated by the Constitutions. Moreover, the Election Code does not provide any guidance as to the conditions under which the venue selection provision may be invoked, thus resulting in an arbitrary application of the law.

The only proper venue for prosecuting the “tampering with a governmental record” charge as alleged in this cause is Jefferson County. The only governmental entity with proper prosecutorial authority over the “tampering with a governmental record” charge as alleged in this cause is the Jefferson County District Attorney’s Office. The only grand jury that can be properly convened to hear the “tampering with a governmental record” charge as alleged in this cause is the Jefferson County Grand Jury. For these reasons and others set forth in this Writ, this Writ must be GRANTED and the indictment against Ms. Stephens DISMISSED.

II. WRIT OF HABEAS CORPUS

Only certain claims are cognizable in a pretrial *writ of habeas corpus*.¹ The Texas Court of Criminal Appeals decision in *Ex parte Weise* sets forth the conditions under which this *writ* is appropriate, and succinctly summarizes the case law on the types of claims that are within the jurisdiction of the court. Among the listed conditions are: (1) that the applicant be illegally restrained; and (2) that a resolution favorable to the applicant would result in the trial court’s inability to proceed, and consequently, in the immediate release of the applicant.²

Applicant Zena Stephens was indicted in the above-listed cause number on April 26, 2018. She is currently restrained of her liberty. She is being prosecuted by the Texas Attorney General

¹ *Ex parte Weise*, 55 S.W.3d 617, 619-20 (Tex. Cr. App. 2001).

² *Id.* at 619.

for a crime that the Texas Attorney General does not have the constitutional or statutory authority to prosecute in this venue.

A determination that the Attorney General does not have the power to prosecute the allegation in Count I of the indictment will terminate this proceeding because it will result in the dismissal of the entire indictment because the Attorney General's conduct in bringing the indictment is inseverable from the remaining counts. A determination that the indictment is not from a grand jury of the proper county will also terminate these proceedings. Similarly, a determination that the Election Code provisions permitting the Texas Attorney General to arbitrarily select venue are unconstitutional will terminate this proceeding.

Therefore, the issues brought forth by the applicant are cognizable, and this pretrial *writ of habeas corpus* is the proper vehicle for seeking resolution of these claims.

III. THE TEXAS ATTORNEY GENERAL'S PROSECUTION OF COUNT ONE EXCEEDS ITS CONSTITUTIONAL AND STATUTORY AUTHORITY

The controlling statute for the offense of "tampering with a governmental record" is Texas Penal Code §37.10. The power to prosecute felony offenses is reserved exclusively for the District Attorney. The duty of criminal prosecution in the trial courts of record is on the county attorney and the district attorney (or criminal district attorney). Every constitution of Texas, as a republic and as a state, has provided for *district attorneys* to represent Texas in criminal prosecutions.³

The current Constitution gives the authority to prosecute criminal cases to the county attorneys, criminal district attorneys, and district attorneys under the regulation of the legislature. The Office of District Attorney lies in the judicial branch of government, while the Office of

³ See REPUB. TEX. CONST. of 1836, Art. IV §5; TEX. CONST. of 1845, Art. IV §12; TEX. CONST. of 1861, Art. IV §12; TEX. CONST. of 1866, Art. IV §14; TEX. CONST. of 1869, Art. V §12; TEX. CONST. Art. V §21.

Attorney General is in the executive branch.⁴ This allows for the separation of powers contemplated in both the United States Constitution and the Texas Constitution.

The Office of Attorney General of Texas has never had authority to initiate a criminal prosecution. Before 1876, it had constitutional authority to represent the State in appeals of criminal cases, and it had statutory authority to do so until 1923. Since then, it has had no general authority to represent the State in a criminal case in any court, except when a county or district attorney requests the attorney general to assist; and even then, only under limited circumstances.⁵

In this case, there is no authority for the Texas Attorney General to prosecute Count I. The Texas Attorney General can only prosecute a tampering with a governmental record case that is done with (a) consent of the appropriate local or county district attorney and (b) involves the State Medicaid program.⁶

Here, the Texas Attorney General has neither the consent of the appropriate local or county district attorney nor does this case involve the State Medicaid program. Accordingly, prosecution of Count I falls to the district attorney of Jefferson County. The legislature's deliberate decision to require (1) consent, and (2) that the offense involve the State Medicaid program, are fatal to the prosecution. The Texas Attorney General does not have prosecutorial authority for Count I.⁷

⁴ TEX. CONST. Art. IV §§ 1, 22; TEX. CONST. Art. V §21.

⁵ See Tex. Penal Code §1.09.

⁶ Tex. Penal Code §37.10(i)

⁷ See TEX. CONST. Art. 4, §22; TEX. CONST. Art. 5 §21; Tex. Code Crim. P. Art. 2.01, 2.021

IV. SIXTH AMENDMENT'S IMPACT ON VENUE IN ELECTION CODE OFFENSES SET FORTH IN COUNTS II AND III

The Sixth Amendment bestows upon every criminal defendant the right to be tried by “an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law....”⁸ The Texas Election Code permits, among other things, the Texas Attorney General to (1) initiate a prosecution of an alleged Election Code offense; and (2) set venue in a neighboring county.⁹

A.THE ATTORNEY GENERAL’S “SELECTION OF VENUE”.

As discussed in section **III.** above, there is no dispute that the Texas Attorney General has no independent authority to initiate a prosecution for “tampering with a governmental record” in violation of Texas Penal Code §37.10(a)(1). However, the Election Code does permit the Attorney General to investigate Election Code offenses as outlined in Counts II and III. The Texas Attorney General recognized this limitation at the outset of its “investigation.”

In an undated letter to the Texas Rangers, Public Integrity Unit, the Texas Attorney General’s Office requested assistance in the investigation of “Election Code offenses.”¹⁰ On June 28, 2017, the Texas Rangers received approval to proceed with the investigation of “Election Code offenses.” Shortly thereafter, the Ranger’s report notes that:

The Texas Attorney General’s Office elected to move the venue from Jefferson County to a neighboring county, Chambers County, as allowed per Election Code Title 16, Section 273.024. All Grand Jury subpoenas, indictments, and court proceedings will be conducted through Chambers County.¹¹

⁸ U.S. Const. amend.VI

⁹ Tex. Elec .Code §§273.021, 273.024

¹⁰ Exhibit B

¹¹ See Exhibit C

B. ARBITRARY VENUE SELECTION IS VIOLATIVE OF THE 6TH AMENDMENT AND 14TH AMENDMENT

Ms. Stephens challenges two components of the Election Code statute. First, the statute does not identify who makes the decision regarding the location of the initiation of prosecution. Nothing in the Texas Constitution references the ability of the Texas Attorney General to select a venue without any judicial oversight. Second, there is no methodology for the selection of any particular county. As applied here, allowing the prosecutor to choose venue violates the Sixth Amendment because venue selection is a component of a fair trial and is required to be statutorily prescribed prior to the initiation of a prosecution, not after.

Texas Code of Criminal Procedure, Article 13.18 reads: “[i]f venue is not specifically stated, the proper county for prosecution of offenses is that in which the offense was committed.” Arguably, the Texas Election Code specifically states that Election Code offenses may be prosecuted in “the county in which the offense was committed or an adjoining county.”¹² However, granting the government complete discretion over where to prosecute Election Code offenses does not comport with the Sixth Amendment guarantee of a trial in the “State and district wherein the crime shall have been committed.”¹³

This “choice of venue” by the prosecutor is the precise harm that the Sixth Amendment intended to guard against. Regardless of the county “selected”, the specific purpose of the Sixth Amendment’s provision is to prevent the selection by the prosecutor of the crime. The Fifth Circuit interpreted the Sixth Amendment to mean that “it is the public policy of the Country that one must not arbitrarily be sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government.”¹⁴

¹² Tex. Elect. Code §273.024

¹³ U.S. Const. amend. VI

¹⁴ *U.S. v. Lipscomb*, 299 F.3d 303, 339 (5th Cir. 2002)

The arbitrary nature of the Texas Attorney General's decision is amplified in light of the mandatory venue provisions related to Count I. Aside from the fact that prosecutorial authority for the "tampering with a governmental record" allegation made here is lacking, the reality is that the Texas Attorney General made a decision to ignore the mandatory venue provisions of Texas Code of Criminal Procedure, Article 13.18. Instead, the Texas Attorney General is attempting to expand the unconstitutional venue selection provision in the Election Code.

A logical starting point for one believing that he had the authority to prosecute the crimes set forth in the indictment would be to initiate such a prosecution in Jefferson County because it is the only county of venue for all three counts in the indictment. Bringing this prosecution in Chambers County, in contravention of basic mandatory venue provisions, raises the curious question of *why* the Attorney General wishes to avoid Jefferson County at all costs. The Texas Constitution provides, in relevant part, that "[t]he power to change the venue in civil and criminal cases shall be vested in the courts."¹⁵ Most importantly here, the State and Federal Constitutions recognize a neutral methodology for making a decision to transfer venue.¹⁶

V. CONCLUSION

In this cause, the indictment alleges all Counts occurred in Jefferson County. There is not now, and has never been, a statute that authorizes the prosecution of an allegation of "tampering with a governmental record" (1) by the Texas Attorney General (2) in an adjoining county. Because tampering with a governmental record is not an Election Code offense. By obtaining an improper multi-count indictment, in an improper county, that the Texas Attorney General necessarily exceed its statutory and constitutional authority. Beyond, that the election code

¹⁵ Tex. Const. Art. 3 §45

¹⁶ See Fed. R. Crim. P. 18; Tex. Code Crim. P. 31

provisions permitting the prosecutor to select venue violate the 6th Amendment to the United States Constitution because it allows a prosecutor to forum shop.

WHEREFORE, Ms. Stephens prays that this Court grant her an evidentiary hearing on this matter and after considering the evidence and considering the applicable law grant the *writ of habeas corpus* and dismiss the indictment against her in its entirety.

Respectfully submitted,

Russell Wilson II
Law Office of Russell Wilson II
SBN 00794870
1910 Pacific Ave #15100
Dallas, Texas 75201
(469)573-0211

By: /S/RUSSELLWILSON II
Russell Wilson II
State Bar No. 00794870
Attorney for ZENA STEPHESON

Chad W. Dunn
Brazil & Dunn LLP
4201 Cypress Creek Pkwy, #530
Houston, TX 77068
Phone: (281) 580-6310
Fax: (281) 580-6362

By: /S/CHAD DUNN
Chad Dunn
State Bar No. 24036507
Attorney for ZENA STEPHESON

SAMUEL & SON LAW FIRM, PLLC
2636 McFaddin
Beaumont, TX 77701
Tel: (409) 833-4111
Fax: (409) 838-2220

By: Sean C. Villery-Samuel
Sean C. Villery-Samuel
State Bar No. 24070802
attysamuel@live.com
Attorney for Zena Collins Stephens

CERTIFICATE OF SERVICE

I certify that on January 9, 2019 a true and correct copy of Response on States Motion for Protective Order was served on the Texas Attorney General by electronic service through the electronic filing manager.

/S/ Russell Wilson II
Russell Wilson II

EXHIBIT A

Assigned to the 344th Judicial District Court

Cause No. 18 DCR0152

Bond Amount: \$ _____

The State of Texas vs. **Zena Collins Stephens**

Count I: Felony Offense (SJF): Tampering with a Governmental Record - Penal Code Sec. 37.10

Count II: Misdemeanor Offense (A): Accepting a Cash Contribution exceeding \$100 - Election Code Sec. 253.033

Count III: Misdemeanor Offense (A): Accepting a Cash Contribution exceeding \$100 - Election Code Sec. 253.033

TRN:

SID:

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, duly selected, organized, sworn and impaneled as such for the County of Chambers, State of Texas, at the JANUARY term, A.D. 2018, of the 344th Judicial District Court for said County, upon their oaths do present in and to said Court that,

COUNT I

on or about the 11th day of October, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, with intent to defraud or harm another, namely: the Jefferson County Clerk or Jefferson County or the citizens of Jefferson County, Zena Collins Stephens did present or use a record or document, namely: a Candidate / Officeholder Campaign Finance Report, by reporting a \$5,000.00 individual cash contribution in the political contributions of \$50.00 or less section of said Report, with knowledge of its falsity and with intent that it be taken as a genuine governmental record,

COUNT II

on or about and between the 23rd day of May, 2016 and the 25th day of May, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, while a candidate, did then and there, knowingly accept from a contributor, namely: Larry Tillery, in a reporting period a political contribution in cash that exceeded \$100, namely: \$1,000.00 in cash,

COUNT III

on or about and between the 27th day of September, 2016 and the 28th day of September, 2016 in Jefferson County, Texas, a county adjoining Chambers County, Texas, and before the presentment of this indictment, Zena Collins Stephens, while a candidate, did then and there, knowingly accept from a contributor, namely: Larry Tillery, in a reporting period a political contribution in cash that exceeded \$100, namely: \$5,000.00 in cash,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

THIS THE 12th DAY OF April
A.D. 20 18 AT 5:40 O'CLOCK P M
PATTI L. HENRY
DISTRICT CLERK, CHAMBERS COUNTY, TEXAS
BY [Signature] DEPUTY

Rose Bolt

FOREMAN OF THE GRAND JURY

4-26-18

DATE

WITNESSES:

1. Brad Weatherford, Texas Ranger
2. Edward Keller
3. Marcia Guillory
4. Craig Andress



Texas Department of Public Safety
Texas Rangers
Public Integrity Unit
Brad Weatherford

Ranger Weatherford,

The Texas Attorney General's Office is requesting investigative assistance from the Texas Rangers, Public Integrity Unit, in the investigation regarding the Jefferson County Sheriff, Zena Stephens, and other public officials that may have committed offenses in the Texas Election Code including, but not limited to, Section 253.033. The Criminal Prosecutions Division of the Texas Attorney General's Office will prosecute viable cases that are developed as to the Jefferson County Sheriff, Zena Stephens, or any other individuals from the investigation of Jefferson County, Texas public officials. The Criminal Prosecutions Division looks forward to working with the Texas Rangers on this investigation. Please contact Shane Attaway with any concerns or questions.

Thank you,

A handwritten signature in black ink, appearing to read "Shane Attaway", is written over a light gray rectangular background.

Shane Attaway
Deputy Chief - White Collar Crime & Public Integrity Section
Assistant Attorney General - Criminal Prosecutions Division
P.O. Box 12548 Austin, TX 78711-2548
512.463.2062 Phone
512.370.9947 Fax
shane.attaway@oag.texas.gov

EXHIBIT C

1.16 The Texas Attorney General's Office elected to move the venue from Jefferson County to a neighboring county, Chambers County, as allowed per Election Code Title 16, Section 273.024. All Grand Jury subpoenas, indictments, and court proceedings will be conducted through Chambers County.